No. 11758

In the United States Circuit Court of Appeals for the Ninth Circuit

ESTATE OF JOSEPH H. HEIDT, DECEASED; LOUISE SEELEY, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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CITATIONS

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 15–32), as well as the dissenting opinion (R. 33), are reported at 8 T. C. 969.

JURISDICTION

The Commissioner determined a deficiency in estate tax against the estate of Joseph H. Heidt, deceased, in the amount of $16,435.01 and mailed notice of the deficiency to Mrs. Louise Seeley, the decedent's former wife (R. 16), as executrix of his estate (R. 9–13). On August 14, 1944, within the permitted ninety-day period, a petition for review was filed with the Tax Court for a redetermination of the deficiency under the provisions of Section 272 of the Internal

Revenue Code (R. 2, 4–13). A hearing was held on June 21, 1946 (R. 34), and the decision of the Tax Court, affirming the Commissioner's determination, was entered May 6, 1947 (R. 33). A petition for review by this Court (R. 165–185) was filed on August 4, 1947 (R. 4, 185), and properly invoked the jurisdiction of this Court under Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether petitioner has sufficiently shown that any part of the eight items of property held in joint tenancy by her and the decedent is excludible from the decedent's gross estate as property which originally belonged to her within the meaning of Section 811 (e) of the Internal Revenue Code.

2. Whether the case is affected by petitioner's contentions, made for the first time in this Court, that the notice of deficiency was improperly addressed to her as executrix of the decedent's estate and that the statute of limitations bars assessment against her as transferee.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 16–21) are as follows:

Joseph H. Heidt died on November 22, 1942, at the age of 99 years and 11 days. At the time of his death he was a resident of North Ridge, California. His widow, who remarried and became Mrs. Louise Seeley

prior to June 14, 1943, is the duly appointed and qualified executrix of his estate. She filed a federal estate tax return for the estate on June 14, 1943, as surviving joint tenant. (R. 16.)

The decedent and Louise Weise (now Louise Seeley) were maried in 1893, at which time he was about 50 years of age and she was 18 years of age. At all times subsequent to their marriage they resided in the State of California until the decedent's death. (R. 16.)

At the time of their marriage the decedent owned no real estate or personal property, other than his personal effects, and after his marriage he did not acquire any property by gift, devise or inheritance except about $1,000 which his wife gave him to start in business. (R. 16.)

The decedent, with the $1,000 given him by his wife, started in the business of a dealer in produce. He started in a store at the Angel's Flight and then opened a small stall in Central Street Market. He specialized in potatoes and onions and became known as the "Potato King." He leased ground to plant potatoes and onions in California and Idaho. His business was successful and he made a great deal of money, but due to market fluctuations he went broke three times during his business career, but never went into bankruptcy. His business was speculative and he sometimes bought property and had the title put in the joint names of himself and his wife. Their bank accounts were also kept in their joint names. On several occasions he told his wife that if anything happened to him he wanted everything to go to her.

It was also understood that if anything happened to her everything would go to him. Decedent continued in business until 1934 when he retired at the age of 91. (R. 17.)

During their entire married life decedent supported his wife and paid all of their living expenses from his earnings. (R. 17.)

The decedent was never engaged in the real estate business. (R. 17.)

Shortly after her marriage, decedent's wife engaged in the real estate business and was very successful. She bought and sold real estate, built houses and apartment houses and hotels and furnished, managed and operated them. A part of the time she had a real estate license, but most of the time she did not. She had about $1,500 when she was married. A part of this, approximately $1,000 she gave to her husband to start in the marketing business. About two months after her marriage her parents gave her, as a wedding present, a deed to a house and lot in Colton, California. This Colton house was traded for a store at Angel's Flight on South Broadway, Los Angeles. This property was sold and with a part of the proceeds she bought a lot in Boyles Heights upon which she built a four room cottage. In the construction of the cottage she received a gift from her father of $400 and $800 from her mother. She subsequently sold the Boyles Heights property and bought a house on Washington Street. She sold this property and bought a place on Ruth Avenue, on which an old house was located. She moved the house and built Boyle Apartments. She furnished the apartment

house (12 apartments) and operated it for about four years, then sold the furniture and leased the building. She continued her real estate operations during her marriage with decedent. (R. 17–18.)

At the death of the decedent there were eight items of property held jointly by the decedent and his surviving spouse. These eight items were reported under Schedule E of the estate tax return and, with the exception of item five (which was excluded with the notation that "Decedent furnished nothing towards the acquisition of this item"), were included in the gross estate at one-half their value, decedent claiming one-half interest therein. (R. 18.) The following facts concerning these items appear in the record (R. 19–21):

One

This property, known as North Ridge Ranch, was bought by the decedent for approximately $28,000 and held in joint tenancy by decedent. The down payment on the property was made with money which he borrowed from a friend. Decedent's wife then sold property, which she had acquired in Palm Springs, for $9,000 and gave the money to the decedent to pay back the borrowed purchase money. The Palm Springs property which stood in her name originally consisted of a house and two lots which cost about $4,500. Decedent's wife bought it with cash accumulated from different properties which had been sold and built two houses on the lots. The North Ridge Property was sold after decedent's death for $30,000.

Two

This property, held in joint tenancy by decedent and his wife, consisted of two apartment houses located at Dunsmere and Eighth Streets in Los Angeles, California. It was acquired by the decedent for cash (derived from profits from different trades made by the decedent and his wife) about 10 or 12 years before the decedent died. It was sold after decedent's death for $55,000.

Three

This property, held in joint tenancy by decedent and his wife, consisted of two houses, one five-room and the other four room, on Sunset Place (or Sunset Park) acquired about 15 years before decedent's death. The decedent paid $12,000 to $14,000 for one property and decedent's wife paid about $15,000 for the other with money acquired by working and accumulated from real estate transactions. The Property was sold after the decedent's death for $18,000.

Four

This property, which was used by the decedent and his wife as a home for a time, is located on El Camino in Beverly Hills. It was acquired by the decedent, who took a mortgage on the property as security for a loan. The property was held by decedent and his wife as joint tenants.

Five

This property was located on Ruth Avenue and known as the Elmo Hotel. It was built by decedent, and first rented, then sold, by the decedent to a

Japanese who gave a joint promissory note to decedent and his wife secured by a deed of trust. Decedent's widow did not know the number of rooms or what its cost was.

Six

The property involved in this item consisted of a joint bank account in The Bank of America in the amount of $21,951.37, some of which was deposited by decedent and some by his wife. At the time of decedent's death approximately $10,000 of the amount in the joint account had been deposited by decedent's wife. The money so deposited came from rents from different buildings and apartments. Decedent's wife deposited all the funds from the business transactions which she made in this joint account.

Seven

The property involved in this item was $1,409.02 deposited in the California Bank, 9941 Wilshire Boulevard, Beverly Hills, to the joint account of decedent and his wife. The money was deposited by the decedent and came from the sale of different properties which had been accumulated.

Eight

The property involved in this item consisted of 20 United States defense bonds of a par value of $2,000 which had been purchased by the decedent with his own funds. They were put in the joint names of decedent and his wife.

In computing the deficiency here in question the Commissioner included in the gross estate the full

value of all eight items of jointly owned property set out above. (R. 21.)

In addition to the jointly owned property which was reported in the estate tax return, the surviving spouse (decedent's wife) owned considerable property, both real and personal, which stood in her own name and was not included in the estate tax return. (R. 21.)

The Tax Court, after taking these findings into account, held that petitioner had failed to prove that any part of the value of the eight jointly held items was attributable to the wife's personal services or to the separate property of the wife and that, therefore, the entire value of all eight items is includible in the decedent's gross estate under Section 811 (e) of the Internal Revenue Code, as amended by the Revenue Act of 1942. (R. 22–32.) Three judges dissented as to items one, three, and six, stating that the findings showed that parts of those jointly held properties oriignally belonged to the wife as a result of her personal efforts and that an allocation could be made. (R. 33.)

SUMMARY OF ARGUMENT

1. Section 811 (e) (1) of the Internal Revenue Code imposes an estate tax on the entire value of property held in joint tenancy by the decedent and another, except such part as may be shown to have originally belonged to the surviving spouse, in this case the petitioner, and not to have been acquired by her from the decedent for less than an adequate and full consideration in money or money's worth. By virtue of paragraph (2) of the section, added by the Revenue Act of 1942 and effective as to decedents

dying after October 21, 1942, community property was no longer treated as belonging one-half to the surviving spouse; an exclusion was authorized of only such part as is shown to have been received as or derived from compensation for services rendered by the surviving spouse or from her separate property. Since the instant decedent died after October 21, 1942, this is the test to be applied in determining whether any part of the eight items of property jointly held by the decedent and petitioner, created from community property, is excludible from the decedent's gross estate. The applicable Treasury Regulations so provide and petitioner's objections to the interpretation of Section 811 (e) (1) in the light of the 1942 amendments and of the Treasury Regulations are without merit. Petitioner had the burden of proof in establishing an exclusion or exclusions under this test and, as the Tax Court held, she failed to sustain her burden of proving that any part of the properties held in joint tenancy was derived from compensation for services rendered by her or from her separate property.

Even if the test impelled by the 1942 amendments and the Treasury Regulations is ignored, petitioner has still failed to sustain her burden of proof. She contends that one-half of the value of the property held in joint tenancy is excludible from the decedent's gross estate on the ground that the joint tenancies were created with community funds, but she fails to distinguish between "old type" and "new type" community property. Since she had a mere expectancy in "old type" community property, one-half of such

community property was not property which belonged to her and therefore would not be excludible from the decedent's gross estate. She has not shown that any part of the jointly held properties was derived from "new type" community property; on the contrary, all signs point to the conclusion that the community property was "old type" community property, in which she had a mere expectancy at the decedent's death.

2. Petitioners contentions with respect to the deficiency notice and statute of limitations have no foundation in the record. They are based on assertions that there was no probate of the decedents estate and that petitioner was never the executrix of the estate. These assertions, made for the first time in this Court, are contrary to the admissions made by petitioner in the Tax Court.

ARGUMENT

I

Petitioner has failed to show that any part of the value of the eight items of property held in joint tenancy by her and the decedent is excludible from the decedent's gross estate as property which originally belonged to her within the meaning of Section 811 (e) of the Internal Revenue Code

At the time of the decedent's death, four items of real estate, one item consisting of a promissory note secured by a deed of trust, two items consisting of two bank accounts and one item consisting of twenty United States defense bonds were held in joint tenancy by the decedent and his wife. Section 811 (e) (1) of the Internal Revenue Code (Appendix, *infra*) requires the inclusion of a decedent's gross estate of

the entire value of property held in joint tenancy by the decedent and another—

> except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: * * *

The statute, whose constitutionality is not open to question [1] and which authorizes an exclusion from the decedent's gross estate only for such part of the jointly held property "as may be shown" to have originally belonged to the decedent's co-tenant, etc., places the burden of proof in establishing an exclusion upon petitioner. *Foster* v. *Commissioner,* 90 F. 2d 486, 488 (C. C. A. 9th), affirmed *per curiam,* 303 U. S. 618; *McGrew's Estate* v. *Commissioner,* 135 F. 2d 158 (C. C. A. 6th); *Bushman* v. *United States,* 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756. The Tax Court held that petitioner (the wife who held the properties jointly with the decedent and who remarried after the decedent's death and on the record (see *infra*) is the executrix of his estate) did not sustain her burden of proof and that therefore the entire value of the jointly held properties is includible in the decedent's gross estate. (R. 22–32.) Petitioner nevertheless contends that one-half originally belonged to her or was attributable to her within the meaning of the statute and that there should at least be an allocation as to items one, three and six.

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[1] *United States* v. *Jacobs*, 306 U. S. 363; *Gwinn* v. *Commissioner*, 287 U. S. 224; *Tyler* v. *United States*, 281 U. S. 497.

The contentions will be answered below under appropriate headings.

A. A mere showing that community funds were used in the creation of the joint tenancies is insufficient to establish an exclusion under the statute and applicable Treasury regulations

As already shown, the exclusion under Section 811 (e) (1) of the value of property held in joint tenancy covers only that part which is shown "to have originally belonged" to petitioner, the decedent's co-tenant, and never to have been received or acquired by her from the decedent for less than an adequate and full consideration in money or money's worth. Petitioner contends that one-half of the properties held in joint tenancy must be considered "to have originally belonged to" her on the ground that the joint tenancies were created with community property. (Br. 14–18.)

The contention may be correct *as to decedent's dying before October 21, 1942.* Prior to the passage of the Revenue Act of 1942, c. 619, 56 Stat. 798, the Internal Revenue Code contained no provision relating to the inclusion of the value of community property in a decedent's gross estate. Community property was therefore taxed one-half to each spouse for estate tax purposes. *Greenwood* v. *Commissioner,* 134 F. 2d 915 (C. C. A. 9th); *United States* v. *Picrotti,* 154 F. 2d 758 (C. C. A. 9th); cf. *Lang* v. *Commissioner,* 304 U. S. 264. As a result, in *Estate of Vandenhoeck* v. *Commissioner,* 4 T. C. 125, a case relied upon by petitioner (Br. 16) which involved the estate of a decedent who died in 1939, the Tax Court stated by way of *obiter dictum* that the surviving spouse had furnished

one-half of the consideration for the property held in joint tenancy, because the jointly held property was purchased with community property, and that therefore one-half of the value of the property held in joint tenancy would for that reason be excludible from the decedent's gross estate under Section 811 (e). The instant case, however, concerns the estate of a decedent who died on November 22, 1942, after the effective date of the 1942 amendments to Section 811 (e).

While the provisions of Section 811 (e) have remained the same since before the decedent's death and still grant an exclusion from a decedent's gross estate for that part of property held in joint tenancy which "originally belonged to" the decedent's surviving cotenant, Section 811 (e) was amended by the Revenue Act of 1942, *supra,* with respect to the ownership of community property for estate tax purposes. Section 402 (b) of the 1942 Act, *supra,* amended Section 811 (e) by changing the title of subsection (e) from "Joint Interests" to "Joint and Community Interests", by numbering as paragraph (1) the prior provisions of the statute relating to joint interests, and by adding paragraph (2) realting to community interests. These amendments became effective October 21, 1942, and are therefore applicable to the estate of the decedent, who died on November 22, 1942. Paragraph (2) of the statute, as added by the 1942 amendments (Appendix, *infra*), which has been held to be constitutional,[2] requires the inclusion in a decedent's

[2] *Fernandez* v. *Wiener*, 326 U. S. 340; *United States* v. *Rompel*, 326 U. S. 367.

gross estate of the entire value of property held as community property—

> except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. * * *

The Ways and Means Committee report on the amendments (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 160 (1942–2 Cum. Bull. 372, 489)), states as follows:

> This section [Section 402 of the 1942 Act] eliminates special estate tax privileges enjoyed by residents of community property jurisdictions by amending section 811 (e) of the Internal Revenue Code. * * * The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment. State presumptions are therefore not operative against the Commissioner.

The Senate Finance Committee report on the amendments (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231–232 (1942–2 Cum. Bull. 504, 673)), contains identical statements. See also, *Fernandez* v. *Wiener,* 326 U. S. 340. Thus, the amendments to Section 811 (e) made by the 1942 Act, both by their express language and according to the Congressional intent, required that community property no longer be treated as belonging one-half to the wife and one-half to the husband for estate tax purposes; only such community property as is shown to have been received as or derived from compensation for services rendered

by the surviving spouse or from the separate property of the surviving spouse is excludible from the decedent's gross estate as having belonged to the surviving spouse prior to the decedent's death.

Paragraph (2) of course relates only to property held as community property at the decedent's death, whereas in the present case community property had been converted into joint tenancies prior to the decedent's death, so that paragraph (1) of the statute, not paragraph (2), is directly applicable. However, since paragraph (2) provides the extent to which the surviving spouse's ownership in community property will be recognized for estate tax purposes as to decedents dying after October 21, 1942, it necessarily follows that the exclusion provided in paragraph (1) for property which "originally belonged to" the surviving spouse means, in the case of joint tenancies created with community funds, such part of the community property as is recognized by paragraph (2) as belonging to the surviving spouse. The statute, as well as the Congressional intent, requires such an interpretation, especially since Congress intended by the 1942 amendments to Section 811 (e) to eliminate special estate tax privileges enjoyed by residents of community property jurisdictions. Accordingly, the exclusion in Section 811 (e) (1) of that part of property held in joint tenancy which "originally belonged to" the surviving spouse includes, in a case where the joint tenancy was created with community property, only that part of the value of the jointly held property which was received as or derived from compensation for services actually rendered by the

surviving spouse or from the surviving spouse's separate property.

The pertinent Treasury Regulations contain a provision to that effect. Section 81.22 of Treasury Regulations 105, as amended (Appendix, *infra*), provides that—

> For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, *such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived from such compensation or from such separate property of such spouse.* Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exceptions stated in the preceding sentence. * * * [Italics supplied.]

Petitioner's objections to the interpretation of Section 811 (e) (1) in the light of Section 811 (e) (2) (Br. 17) are without valid foundation. The 1942 amendments to Section 811 (e) are applicable to decedent's dying after October 21, 1942, and the instant decedent died after that date. The

fact that the transfers to joint tenancies occurred prior to October 21, 1942, is immaterial so far as the applicability of the amendments is concerned, both constitutionally and otherwise. The estate tax is laid on the ripening or shifting at death of incidents of property regardless of the ownership of the property, not on the transfer to a joint tenancy, and, accordingly, there can be no constitutional objection to the application of the 1942 amendments to transfers made before the effective date of the amendments in a case where, as here, the decedent died after the effective date of the amendments. See *Fernandez* v. *Wiener,* 326 U. S. 340; *United States* v. *Rompel,* 326 U. S. 367; *United States* v. *Jacobs,* 306 U. S. 363; *Gwinn* v. *Commissioner,* 287 U. S. 224. The statute itself recognizes no difference between joint tenancies created before and after the passage of the 1942 amendments so far as the estates of decedents dying after the effective date of the amendments are concerned. On the contrary, Section 811 (e) (1) requires, as it did prior to the amendments, that the surviving spouse's ownership in the jointly held property be determined on the basis of the *origin* of the property and the origin necessarily goes back beyond the time the joint tenancy was created and in some cases, as here, to a time before the passage of the amendments. While a determination in the present case of what constitutes property which "originally belonged to" the surviving spouse perhaps rests on a change in the recognition of ownership of community property, that change, made by the 1942 amendments, is constitutionally applicable to the es-

tates of decedents dying after October 21, 1942. *Fernandez* v. *Wiener, supra; United States* v. *Rompel, supra.* If petitioner is correct in stating (Br. 17) that "clear and convincing evidence" is required to show that Congress intended Section 811 (e) (1) to be interpreted in the light of Section 811 (e) (2), that evidence is found in the fact that paragraph (2) was made a part of the same subsection which had previously covered only joint interests and in the Congressional intent to eliminate special estate tax privileges enjoyed by residents of community property jurisdictions. Petitioner is of course contending for an interpretation of Section 811 (e) (1) which would frustrate that purpose in respect of joint tenancies.

Although that part of Section 81.22 of Treasury Regulations 105 which has already been quoted merely recognizes the required effect of the 1942 amendments in connection with a determination of what constitutes community property which "originally belonged to" the surviving spouse under Section 811 (e) (1), petitioner contends that the Regulations are inapplicable in the present case because they were promulgated after the decedent died. The promulgation of the Regulation was not of course the enactment of a new law; it merely interpreted Section 811 (e). The date of its promulgation is therefore no barrier to its applicability. Further, since it is reasonable as being consistent with the statute and the Congressional intent, it is valid. As the Supreme Court stated in *Commissioner* v. *South Texas Lumber Co.,* decided on March 29, 1948 (1948 P–H, par. 72,004):

> This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons. * * *

B. Petitioner failed to make the showing required by the statute and applicable Treasury regulations for the exclusion of any part of the value of the eight items

As we have already shown, under the statute and applicable Treasury Regulations that part of the eight items of property held by the decedent and petitioner in joint tenancy which "originally belonged to" petitioner and is therefore excludible from the decedent's gross estate under Section 811 (e) (1) consists of that part of the joint tenancy properties which is shown to have been received as or derived originally by petitioner from compensation for personal services rendered by her or from her separate property. The record does not support the conclusion, and petitioner does not contend, that the mere creation of any of the joint tenancies was intended as compensation to her for services rendered. Therefore, no part of the properties held in joint tenancy was "received" by petitioner as compensation for services rendered. It follows that the question here is only whether any part of any one or more of the eight items of joint tenancy was "derived from" compensation for personal services rendered by petitioner was "derived from" her separate property. In that connection, Section 81.23 of Treasury Regulations 105 (Appendix,

infra), to which reference is made in Section 81.22 of the same Regulations as being applicable under Section 811 (e) (1) of the Code, provides:

> Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. * * *

Petitioner contends that one-half of items one, three and six is excludible from the decedent's gross estate as being attributable to her own separate property (Br. 19–20, 23–24) and that one-half of all of the eight items except item eight is excludible as being attributable to her own activities in the real estate business (Br. 20–22). Neither contention is sufficiently supported by the record, we submit.

1. *The evidence is insufficient to establish that any part of items one, three and six was derived from petitioner's separate property*

As to item one, a ranch, petitioner assumes that the down payment was made with her own funds and asserts that the entire ranch was her separate property because the rule in California is that property becomes the separate property of the wife when the down payment is made from the funds of the wife and community funds are used to pay the balance. The argument overlooks the fact that title to the ranch was taken in joint tenancy and that, therefore, the ranch

itself could not have become petitioner's separate property. In any event, the California rule is unavailable to petitioner, for the 1942 amendments to Section 811 (e) were specifically designed to make presumptions under State law inapplicable. H. Rep. No. 2333, *supra;* S. Rep. No. 1631, *supra;* Treasury Regulations 105, Sec. 81.23.

Nor has petitioner shown any reason for an allocation as to item one. She asserts that the down payment was made with her own funds, but the findings of the Tax Court (R. 19) do not establish that as a fact. The Tax Court found that the down payment was made by the decedent with borrowed funds and that petitioner sold the Palm Springs property for $9,000 and gave the $9,000 to the decedent to repay the loan. The $9,000 is attributable to petitioner only if it was derived *originally* from separate property of petitioner and under the express language of Section 811 (e) (1) this requires a showing that the Palm Springs property, from which the money was obtained, was not acquired by petitioner from the decedent for less than an adequate and full consideration in money or money's worth. As the Tax Court found (R. 19) from petitioner's testimony (R. 54, 89), the Palm Springs property was purchased with cash accumulated from the sale of different properties. Petitioner has altogether failed to trace the property back to any property which originally belonged to her as her separate property. Thus, this is a case where there is no reason shown for an allocation, not a case where, as in *Cohan* v. *Commissioner,* 39 F. 2d 540 (C. C. A. 2d), the taxpayer showed a

reason for an allocation but no basis on which it could be made.

At to item three, petitioner claims that an allocation should have been made by the Tax Court on the ground that she paid for one of the houses covered by the item. (Br. 19.) The fact that she paid for the house does not establish that it was her separate property. The pertinent inquiry is what funds she used in payment and on this point the Tax Court's findings (R. 19–20) based on petitioner's testimony (R. 69–70, 92) are that the money was acquired by working and accumulated from real estate transactions. The latter may or may not have been exchanges of petitioner's separate property. Petitioner has not shown that they were.

As to item six, petitioner states that \$10,000 in the joint bank account covered by the item was her own. (Br. 19.) The Tax Court found (R. 20–21) on the basis of petitioner's testimony (R. 71) that the money in the account came from rents from different buildings and apartments. On the crucial question—whether the rents were from buildings and apartments which were petitioner's separate property—petioner has offered no proof.

In considering the evidence, there are two reasons why no inferences should be drawn in petitioner's favor. First, there is the fact that the inferences are for the Tax Court, which made the most favorable findings possible for petitioner on the evidence but found itself unable to draw any of the ultimate inferences necessary to sustain her position. Second, there is the fact that, while petitioner received some

separate property from her family in 1893 and subsequently worked and conducted real estate transactions, at the decedent ~~petitioner~~'s death, as the Tax Court found (R. 21), petitioner owned "considerable" property, both real and personal, which stood in her own name and was not included in the estate tax return. Since the Tax Court found that the decedent also had a very successful business of his own and made a great deal of money (R. 17) and the evidence and findings of the Tax Court show that all five items of real estate involved here (including the property which secured the promissory note) were purchased by the decedent, not petitioner, it is a permissible and logical inference that the properties which stood in petitioner's own name at the decedent's death were the only properties which were derived by petitioner from the combination of her labors in the real estate field and the profits and income from exchanges of her original separate property.

2. ***The evidence is insufficient to establish that one-half of items one to seven, inclusive, was derived originally by petitioner as compensation for services rendered***

It is unquestionable, of course, that petitioner received some compensation during her marriage in connection with her real estate activities. It does not follow, however, that the Tax Court was required to assume that such compensation found its way into any of the items which were held in joint tenancy at the decedent's death. The five items of real estate involved here were purchased by the decedent, not petitioner, and, as already stated, it is a reasonable conclusion that the compensation which

petitioner derived from her real estate dealings was reflected in the "considerable" property (R. 21) which she held in her separate name at the decedent's death.

It should be noted that petitioner admits that as to the United States defense bonds, item eight, the joint tenancy was a gift to her from the decedent. (Br. 20.) This necessarily is a concession that the entire value of item eight is includible in the decedent's gross estate.

C. Even if the test required by the statute and applicable Treasury regulations were not applied, the evidence would be insufficient to show that any part of the properties held in joint tenancy originally belonged to petitioner

The Tax Court's decision is correct, we submit, even if no reliance is placed upon the pertinent Treasury Regulations and 1942 amendments to Section 811 (e). Petitioner's burden would still be to show that some part of the jointly held properties "originally belonged to" her and ~~were~~ are not acquired from the decedent for less than a full consideration in money or money's worth. Thus, while the joint tenancies may have been created with community property, that fact does not establish that one-half of the jointly held properties belonged to petitioner unless one-half of the community property "originally belonged to" petitioner. She has not shown that it did.

In arguing that one-half of the eight items of jointly held property originally belonged to her as having been created from community property, petitioner ignores the two types of community property which exist in California and erroneously assumes (Br. 15) that the mere fact that these eight items of

property were acquired after July 29, 1927, is sufficient to establish that the properties were acquired with community property in which petitioner had a present, existing and vested right. However, as this Court stated in *Rogan* v. *Delaney,* 110 F. 2d 336, 337, certiorari denied, 311 U. S. 660:

> Formerly, in California, the wife's interest in community property was not a present existing interest, but was a mere expectancy, * * * How, by § 161a of the Civil Code (added by Stats. 1927, c. 265, p. 484, effective July 29, 1927), it is provided: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the maangement and control of the husband * * *." *But § 161a does not apply to community property acquired before July 29, 1927, * * *; nor to property received in exchange for or purchased with the proceeds of such community property, * * *; nor to income derived therefrom, * * *.*
>
> Thus, in California, there are two types of community property: (1) Community property in which the wife has a present existing interest and (2) community property in which the wife has no such interest. * * * [Italics supplied.]

See also, *Gump* v. *Commissioner,* 124 F. 2d 540 (C. C. A. 9th), certiorari denied, 316 U. S. 697. It is obvious of course that the California "old type" community property, in which the wife had only a mere expectancy, cannot be considered property one-half of which "originally belonged to" the wife. Cf. *United*

States v. *Malcolm,* 282 U. S. 792, and *Rogan* v. *Delaney, supra,* in which it was held that the entire income from "old type" community property is taxable to a California husband. It follows, necessarily, that petitioner's contention that one-half of the value of the eight items of joint tenancy "originally belonged to" her as community property requires, as a basis for consideration of the argument, a showing that the eight joint tenancies were not created with "old type" community property, that is, community property which had its derivation in community property acquired prior to July 29, 1927.

Petitioner has failed to make such a showing. None of the eight items of property held in joint tenancy ~~were~~ traced to "new type" community property. On the contrary, the findings of the Tax Court, which petitioner does not dispute, affirmatively reflect that the community property involved was "old type" community property. First of all, there is the over-all picture portrayed by the evidence and findings of the Tax Court. After their marriage in 1893 the decedent and petitioner both carried on separate and successful businesses, but by July 29, 1927, they had been married for 34 years and the decedent was then 84 years of age and petitioner 52 years of age. The decedent retired from business in 1934 at the age of 91. While the decedent and his wife apparently did not altogether stop purchasing property until shortly before the decedent's death in 1942, it is only logical to conclude that most, if not all, of the community property held by the decedent and his wife after July 29, 1927, had its derivation in, and there-

fore was, "old type" community property in which petitioner had only a mere expectancy, not a one-half present and vested ownership. Further, it is significant that some of the real estate properties held in joint tenancy were acquired before the decedent retired in 1934. For example, the Tax Court found (R. 19) that, as petitioner testified (R. 61–62, 90–91), item two, consisting of two apartment houses, was acquired 10 or 12 years before the decedent died, and thus in 1930 or 1932, and that the properties were acquired with cash derived from profits from previous trades made by decedent and his wife. As to item three, the Tax Court found (R. 19–20) from petitioner's testimony (R. 91) that the purchase was made about 15 years before the decedent died, and thus in 1927, with money acquired by working and accumulated from real estate transactions. The property which secured the promissory note covered by item 5 was stated by petitioner to have been built by the decedent about 14 years ago (R. 64) which, since the hearing before the Tax Court was in 1946 (R. 34), would have been in 1932.[3] Thus, all signs point to the conclusion that the community property involved was "old type" community property and, accordingly, was not property one-half of which belonged to petitioner. In any event, petitioner has failed to trace any of these jointly held properties to "new type" community property.

[3] Petitioner's testimony does not show when item four was acquired. Item one may have been acquired in 1940 (R. 88), although the Tax Court did not so find.

II

Petitioner's contentions with respect to the notice of deficiency and statute of limitations are without basis in the record

Petitioner contends that the notice of deficiency was improperly addressed to her as executrix of the decedent's estate; that, while she was liable for the estate tax on the decedent's estate as transferee, there has been no assertion of liability against her as transferee; and that the statute of limitations bars assessment against her as transferee. (Br. 25.) If these contentions are intended to raise a jurisdictional question, they do not have that effect, for the contentions are based on assertions that there was no probate of the decedent's estate and that petitioner therefore was never the executrix of the estate—assertions which are contrary to the record made by petitioner in the Tax Court.

At the hearing before the Tax Court Mr. Clark, petitioner's counsel (R. 34), stated that he was willing to stipulate that the estate had been probated and explained the technical manner in which an estate may be probated in California (R. 83). Further, petitioner's petition for review filed in the Tax Court alleged that (R. 4)—

> 1. Petitioner, Louise Seeley, is the duly appointed, qualified and acting executrix of the Estate of Joseph H. Heidt, deceased.

and no question was ever raised in the Tax Court by petitioner as to her status as executrix of the decedent's estate. She plainly is in no position to raise the question for the first time in this Court on a record which not only fails to contain evidence to support her

position but shows that she admitted by affirmative allegation in her pleading that she was the executrix of the estate.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

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MAY 1948.

APPENDIX

Internal Revenue Code.

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

*   *   *   *   *

(e) [as amended by Section 402 of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Joint and Community Interests.*

(1) *Joint interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance,

as a tenancy, by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the proeprty by the number of joint tenants.

(2) *Community interests.*—To the exent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. (26 U. S. C. 1940 ed., Sec. 811)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.22 [as amended by T. D. 5239, 1943 Cum. Bull. 1081].

Property held jointly or by the entirety.—The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the rights of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the

decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 811 (e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right of survivorship and no interest therein forms as part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

The entire property is prima facie a part of the decedent's gross estate. But it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner should neither have parted with any consideration in its acquirement. Facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. (2) If the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) If the property, or a part

thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than an adequate and full consideration in money or money's worth, then such portion of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) If the property was acquired by the decedent and his or her surviving spouse as tenants by the entirety by gift, bequest, devise, or inheritance, then only one-half of the property becomes a part of the gross estate. (5) If the property was acquired by the decedent and the other joint owner as joint tenants by gift, bequest, devise, or inheritance, and their interests are not otherwise specified or fixed by law, then only one-half of the property is a part of the gross estate; or, if so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall be deemed the owners of equal fractional parts, and one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) If the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) if the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) if the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire property should be included; (d) if the other joint owner, prior to the acquirement of the property, received from the decedent, for less than an ade-

quate and full consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) if the decedent furnished no part of the purchase price, no part of the property should be included; (f) if the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the property should be included.

For the purposes of the estate tax, a relinquishment or promised relinquishment of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the mean-

ing of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

Sec. 81.23 [as amended by T. D. 5239, 1943 Cum. Bull. 1081].

Community property.—In the case of estates of decedents dying after October 21, 1942, the gross estate includes the entire community property held by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such comensation or from separate property of the spouse. Section 811 (e) (2) also provides that in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. The rule established by this statute for apportioning the respective contributions of the spouses is applicable regardless of varying local rules of apportionment, and State presumptions are not operative against the Commissioner. The burden of identifying the property which may be excluded from the community interest rests upon the executor.

As to the inclusion of transfers of community property during life, see section 81.15, and for treatment of life insurance acquired with community property, see sections 81.25 and 81.27.

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U. S. GOVERNMENT PRINTING OFFICE: 1948